No. 88-2109

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Supreme Court of the United States

OCTOBER TERM, 1988

THE STATES OF KANSAS AND MISSOURI,
AS *PARENS PATRIAE*,

Petitioners,

v.

THE KANSAS POWER & LIGHT COMPANY,

AND

UTILICORP UNITED, INC.,

Respondents.

BRIEF OF THIRTY-TWO STATES AS AMICI CURIAE ON BEHALF OF PETITIONERS FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

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BRIEF OF THIRTY-TWO STATES AS AMICI CURIAE ON BEHALF OF PETITIONERS FOR A WRIT OF CERTIORARI

INTRODUCTION

The States of Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon,

Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin (hereinafter "Amici States") submit this brief in support of Kansas' and Missouri's Petition for Writ of Certiorari.

INTERESTS OF THE AMICI STATES

The Attorneys General of the Amici States are the chief law enforcement officers of their states and are charged with the duty of enforcing both state and federal antitrust laws. In their parens patriae capacity, the Amici States, represented by their attorneys general, are authorized to bring federal antitrust actions to recover damages on behalf of the citizens of their states.[1/] The Amici States have a vital interest in preventing the erosion of their parens patriae authority.

1/ 15 U.S.C. § 15c. See also Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (common law parens patriae authority).

The States, thus, play a major role in antitrust enforcement and have a substantial interest in ensuring that the antitrust laws are interpreted in accord with sound antitrust policy and the prior decisions of this Court.

The Amici States support the contention of Kansas and Missouri that the instant suit on behalf of residential consumers is within the cost-plus exception to Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Kansas and Missouri assert that the cost-plus exception controls because the federal[2/] and state[3/] regulation of natural gas utilities creates a

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2/ See the Natural Gas Act, 15 U.S.C. § 717 et seq. (1982) and the Natural Gas Policy Act, 15 U.S.C. § 3301 et seq. (1982).

3/ See Kan. Stat. Ann. §§ 66-1,201, 66-1,206 (1985); Mo. Rev. Stat. §§ 368.250(5), 393.140(1), 393.270(2) (1986).

cost-plus pricing arrangement, passing on all of the increased cost of gas to the consumer.[4/]

The Tenth Circuit Court of Appeals rejected Kansas' and Missouri's contention, holding that the states could not bring a parens patriae action on behalf of their residential consumers who were indirect purchasers of the natural gas. See In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1294 (10th Cir. 1989) (reprinted in Appendix A of the Petition for Writ of Certiorari). In so holding, the Tenth Circuit weakened antitrust law by depriving injured residential consumers of relief and by creating a split between the circuits.

4/ Many of the Amici States have also enacted statutes that cause costs of natural gas production to be passed through to the ultimate consumers. See, e.g., Conn. Gen. Stat. § 16-196 (1989); Md. Code Ann. art. 78 § 54D (1980 Repl. Vol.); Ohio Rev. Code § 4905.302 (Supp. 1988); 66 Pa. Cons. Stat. Ann. § 1307(f) (1984); Va. Code § 56-235 (1986 Repl. Vol.).

SUMMARY OF ARGUMENT IN FAVOR OF GRANTING THE WRIT

1. The Tenth Circuit's decision deprives overcharged residential consumers who purchase products pursuant to a regulatory cost-plus contract of the right to sue for injury they have clearly suffered. It also deprives them of the most appropriate counsel to represent their collective interests--State attorneys general. This Court should resolve the substantial issues raised in this case regarding the States' parens patriae authority.

2. The Tenth and Seventh Circuits have reached opposite results when faced with the same set of material facts: an illegal price fixing conspiracy by producers of natural gas sold to residential consumers pursuant to a regulatory cost-plus arrangement. This Court should resolve the conflict between the circuits.

3. The Seventh Circuit's en banc decision, in Illinois v. Panhandle Eastern Pipe Line Co., 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S. Ct. 543 (1988), comports with sound antitrust policy.

Moreover, on the facts presented in both that case and the instant case, the Seventh Circuit's decision properly reconciles the policy set forth by this Court in Illinois Brick with the intent of Congress in enacting the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

ARGUMENT IN FAVOR OF GRANTING THE WRIT

I.

THE TENTH CIRCUIT'S DECISION RAISES SUBSTANTIAL ISSUES REGARDING THE STATES' PARENS PATRIAE AUTHORITY.

Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (hereinafter "Hart-Scott-Rodino")[5/] empowers State attorneys general to enforce the federal antitrust laws by representing their resident natural persons.[6/] Throughout the

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5/ Pub. L. No. 94-435, 90 Stat. 1383 (1976). Title III added sections 4C through 4H to the Clayton Act, 15 U.S.C. §§ 15c through 15h.

6/ Congress conferred this parens patriae authority in response to California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir. 1973), cert. denied, 412 U.S. 908 (1973). In (Continued)

thirteen years since its creation, the States' parens patriae authority has been a powerful and effective weapon against antitrust wrongdoing.[7/] Courts have recognized the superiority of the parens patriae action as a tool for representing the collective claims of a

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Frito-Lay, the Ninth Circuit held that the state could not maintain an action as parens patriae on behalf of citizen-consumers to recover monetary damages for injuries suffered from an alleged price-fixing conspiracy among snack food manufacturers. 474 F.2d at 777. The court recognized that California had advanced what was "perhaps the most suitable" answer to deal with the problem of antitrust deterrence, but declined to usurp the power of the legislative branch. Id.

7/ See, e.g., In re Panasonic Consumer Electronics Antitrust Litigation (Civ. Action No. 89 Civ. 0368 (SWK)) (S.D.N.Y. 1989) ($16 million parens settlement available for 665,000 consumers obtained by 49 States and the District of Columbia); In re Minolta Camera Products Antitrust Litigation, 668 F. Supp. 456 (D. Md. 1987) ($4 million parens settlement available for over 300,000 consumers obtained by 36 states and the District of Columbia); Connecticut v. Waldbaum, Inc., Dkt. No. H-87-263 (D. Conn. 1987); Connecticut v. Stop & Shop Co., Inc., Dkt. No. H-86-688 (D. Conn. 1988) (in settlement of related parens cases, coupons valued at $21 million obtained for Connecticut consumers); In re Mid-Atlantic Toyota Antitrust Litigation, 605 F. Supp. 440 (D. Md. 1984) ($5 million parens settlement for over 35,000 consumers obtained by five States and the District of Columbia).

State's citizens.[8/] Indeed, "it is difficult to imagine a better representative of the retail consumer within a State than the State's Attorney General." In re Ampicillin Antitrust Litigation, 44 F.R.D. 269, 274 (D.D.C. 1972); See also In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971).

The decision below deprives residential consumers of a remedy for the overcharges they paid. In any event, the damage suffered by any given consumer is too small to justify substantial expenditure of time and money in protracted litigation. This is precisely the type of lawsuit that the parens patriae provisions were designed to permit.

In addition, public utility commissions may require regulated utilities to pass recoveries from

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8/ "The parens patriae action is plainly superior to the [Rule 23] class action as a mode for adjudication of collective claims." In re Montgomery County Real Estate Antitrust Litigation, 1988-2 Trade Cas. (CCH) ¶ 68,230 (D. Md. 1978). See also Pennsylvania v. Budget Fuel Co., 1988-2 Trade Cas. (CCH) ¶ 68,229 (E.D. Pa. 1988).

lawsuits on to residential consumers. As a result, regulated utilities may have "no incentive to sue because they will have nothing to gain from the suit." Panhandle Eastern, 852 F.2d at 895. Thus, unless State attorneys general are allowed to represent residential consumers in these cases, price fixers may elude justice.

State attorneys general have the incentive, and the experienced, specialized antitrust counsel, to prosecute these suits vigorously on behalf of their citizens. This Court should permit these injured residential consumers to obtain representation by their State attorneys general.

II.

THE SEVENTH AND TENTH CIRCUITS ARE IN CONFLICT REGARDING THE EXISTENCE OF THE REGULATORY COST PLUS EXCEPTION TO ILLINOIS BRICK

The facts before the Seventh Circuit in Panhandle Eastern and before the Tenth Circuit in the

instant case are similar in all material respects.[9/] In both cases, the State attorneys general brought suit as parens patriae on behalf of residential consumers who purchased natural gas from regulated utility companies that had passed along all overcharges caused by producers' illegal price fixing.[10/] The Seventh Circuit

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9/ Indeed, the district court opinion stated that the Panhandle Eastern case and the instant case have "almost identical facts." In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1117 (D. Kan. 1988). The appellate court's effort to distinguish this case from Panhandle Eastern fails. The purported distinctions it draws are not based on factual differences but upon the ground that facts present in Panhandle Eastern "may or may not" be present here. The court noted that there "may" be formal cost-plus pricing in this case. App. A, A 13-14. The court further noted that in this case the 100% pass-on in Panhandle Eastern "may or may not" be present here. Id. at 14. Yet the state statutes in Panhandle Eastern and the regulations in the instant case are nearly identical. Both require a 100% pass on. See footnote 10.

10/ In Panhandle Eastern, the court found that the full amount of the illegal overcharge was passed on to residential consumers. 852 F.2d at 892. In the instant case, the Circuit Court "assumed that there was a perfect and provable pass-on of the illegal overcharge...." App. A, A8-13. In fact, the regulatory schemes in effect in Illinois, Kansas, and Missouri require regulated utilities to pass price increases from suppliers on to their residential (Continued)

allows residential consumers to recover damages from gas producers that fix prices under the "cost-plus" exception stated in Illinois Brick Co. v. Illinois, 431 U.S. 720, 735-36 (1977), but the Tenth Circuit does not.

The conflict between the Circuits centers on whether a cost-plus exception is available when the regulatory scheme does not require consumers to purchase a fixed quantity from the utility.[11/] In the instant case, the court below construed the cost-plus exception in Illinois Brick to require a contract for a fixed quantity. As it is highly impractical for consumers to contract for a fixed quantity of natural

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consumers. See Panhandle Eastern, 852 F.2d at 895; Petition for Writ of Certiorari at 4 n.3.

11/ Petitioners advance a claim only on behalf of residential consumers of the regulated product. First, Hart-Scott-Rodino limits State attorneys general parens patriae lawsuits to those on behalf of "natural persons." 15 U.S.C. § 15c. Second, the Seventh Circuit in Panhandle Eastern determined that industrial customers should not be allowed to sue for damages because a different and more difficult apportionment of damages would be necessary. 852 F.2d at 898.

gas, the cost-plus exception was deemed inapplicable. App. A, A 12-13.

The Panhandle Eastern court held that a fixed quantity provision was not an essential condition for the cost-plus exception when dealing with a regulated industry.[12/] The court found that a fixed quantity provision in a cost-plus contract allows the direct purchaser to maximize its profits. It may pass on the full overcharge because its buyer must purchase the quantity of goods stated in the contract. Similarly, the presence of regulation and mandatory pass-on provisions allows regulated utilities to maximize profits from residential consumers by passing on the

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12/ The court stated that the term "fixed quantity" in Illinois Brick was related to the facts in that case: a requirements contract for the purchase of unlimited quantities of one of a large number of building components. "Certainly there is no indication that the Supreme Court meant to address the issue of regulatory cost-plus pricing [in Illinois Brick]" 852 F.2d at 893. The court added the common sense observation that "we do a disservice to the Court by wrenching its words out of context and giving them talismanic significance; we make language a trap rather than a mode of communication." Id.

full overcharge to them.[13/] Thus, the court held that regulation is a "stand in" for the fixed quantity requirement. 852 F.2d at 896.

This Court should resolve the conflict between the circuits so that all States will be able to utilize the cost-plus exception in regulatory cases.

III.

THE DECISION OF THE SEVENTH CIRCUIT IS CONSISTENT WITH BOTH ILLINOIS BRICK AND THE STATES' PARENS PATRIAE AUTHORITY

The Seventh Circuit's decision in Panhandle Eastern recognizes the injustice that would result from the dismissal of this type of parens patriae lawsuit.[14/] Moreover, it reconciles Illinois Brick with

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13/ In both this case and Panhandle Eastern, the regulatory schemes require passing on of increased gas prices. See Petition for a Writ of Certiorari at pp. 4, 9.

14/ "[T]he doubts here are too small to warrant our insisting that this potentially serious antitrust violation, which may have caused consumers to pay almost $50 million in higher prices, shall go unremedied, as it may if we accept [the pipeline's] view of the scope of Illinois Brick." Panhandle (Continued)

the intent of Congress in Hart-Scott-Rodino.

A.

REGULATORY COST-PLUS CONTRACTS ELIMINATE THE COMPLEXITY AND DAMAGE APPORTIONMENT CONCERNS OF ILLINOIS BRICK

The court below noted the Illinois Brick Court's concern that permitting indirect purchasers to seek damages would introduce undue complexity into already complex antitrust litigation. The court stated that allowing states to pursue parens patriae claims would complicate proof of damages by adding "unnecessary issues." App. A, A10. In this, the lower court disregarded congressional intent to permit courts to deal with the complexities inherent in parens patriae cases. Nevertheless, in light of the pass-on, apportioning damages in this case will be much less complex than it would have been in Illinois Brick.

By contrast, the Panhandle Eastern court was not troubled by problems of calculation and apportionment

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Eastern, 852 F.2d at 898.

of damages. It stated that a "cost-plus" contract obviates the problem of apportioning damages because the whole of any price increase has been passed on to the indirect purchaser. 852 F.2d at 894, 896-97. See also California v. ARC America Corp., 109 S. Ct. 1661, 1666 n.6 (1989) ("indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them").

Apportioning damages in this case is easy. Because the utility is a monopolist, it could charge consumers a higher price but for the existence of regulation. Thus, the utility possesses "unused monopoly power" and can require residential customers to pay the whole overcharge. 852 F.2d at 895. As a result, it is not significantly more difficult to apportion injury in this situation than it is to calculate the injury suffered by the direct purchaser.[15/]

15/ One of the rationales given by the Tenth Circuit for refusing to recognize a regulatory cost-plus (Continued)

B.

THE STATES ARE THE BEST PLAINTIFFS TO SUE ON BEHALF OF RESIDENTIAL CUSTOMERS IN REGULATORY COST-PLUS CASES

The court below noted that this Court in Illinois Brick made a policy judgment that direct purchasers should be encouraged to sue by offering them the incentive of recovering all the damages they sustained. The court stated that permitting the States to bring these parens patriae cases would reduce this incentive and would shift "the cost and incentive of policing and enforcing the antitrust laws to the states." App. A, A10. The court's perspective is totally at odds with the concerns of Congress. In Hart-Scott-Rodino, Congress decided that in cases

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exception is the difficulty of calculating the extent to which indirect purchasers mitigated damages by seeking alternate energy sources. App. A, A 12. However, Panhandle Eastern directly addressed this contention. Even if the total amount of gas sold were lowered because of the conspiracy, consumers are still injured by the overcharges paid for the units they did purchase. 852 F.2d at 896. Residential consumers were not seeking to recover for items of expense beyond the overcharge.

where natural persons (residential consumers) are injured, the cost and burden of representing these citizens should shift to the States.[16/]

The Seventh Circuit's opinion is consistent with this Court's recent decision in California v. ARC America Corp., 109 S. Ct. 1661 (1989) which recognized that indirect purchasers could, in certain instances, be better antitrust enforcers than direct purchasers. Pointing to its decision in Illinois Brick, this Court stated:

> Indeed, we implicitly recognized as much in noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them. See 431 U.S. at 732 n.12.

109 S. Ct. at 1666 n.6. A regulatory cost-plus contract is one of those instances. See Petition for Writ of Certiorari at pp. 10-13.

16/ Regulated utilities have little incentive to prosecute antitrust claims on behalf of residential consumers. See pp. 8-9, supra. Thus, the need for State attorneys general to represent their citizens is particularly important in cases of regulatory pass-ons.

C.

THE VIEW OF THE SEVENTH CIRCUIT IS CONSISTENT WITH ILLINOIS BRICK AND THE INTENT OF CONGRESS

The Seventh Circuit's decision in Panhandle Eastern comports with both the policies of Illinois Brick and the parens patriae provisions of Hart-Scott-Rodino. The court recognized that permitting an action on behalf of residential purchasers of natural gas pursuant to regulatory cost-plus pricing did not offend the policies articulated in Illinois Brick. Further, the Seventh Circuit also permitted the Attorney General of Illinois to act in the manner authorized by Hart-Scott-Rodino. The parens patriae suit allowed the Attorney General to protect the residential consumers of his State and to ensure vigorous enforcement of the antitrust laws.

In contrast, the decision of the Tenth Circuit ignores the public policy concerns of Illinois Brick. Moreover, by expressing concern that Kansas and Missouri sought to "shift" the responsibility of

prosecuting antitrust cases on behalf of their citizens, the lower court subverts the important goals of Hart-Scott-Rodino. This decision hampers the ability of attorneys general to maintain suit when numerous citizens have been injured. Yet, Congress enacted Hart-Scott-Rodino to permit this type of suit. For these reasons, as well as those articulated by the Seventh Circuit in Panhandle Eastern, the decision of the Tenth Circuit should be overturned.

CONCLUSION

For the foregoing reasons this Court should grant the petition of Kansas and Missouri for a Writ of Certiorari.

DATED: July 24, 1989

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